

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LOS ANGELES COUNTY FLOOD :

4 CONTROL DISTRICT, :

5 Petitioner : No. 11-460

6 v. :

7 NATURAL RESOURCES DEFENSE :

8 COUNCIL, INC., ET AL. :

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10 Washington, D.C.

11 Tuesday, December 4, 2012

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:11 a.m.

16 APPEARANCES:

17 TIMOTHY T. COATES, ESQ., Los Angeles, California; on
18 behalf of Petitioner.

19 PRATIK A. SHAH, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.;
21 for United States, as amicus curiae.

22 AARON COLANGELO, ESQ., Washington, D.C.; on behalf of
23 Respondents.

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1 P R O C E E D I N G S

2 (11:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 11-460, Los Angeles Flood Control District
5 v. The Natural Resources Defense Council.

6 Mr. Coates.

7 ORAL ARGUMENT OF TIMOTHY T. COATES

8 ON BEHALF OF THE PETITIONER

9 MR. COATES: Mr. Chief Justice, and may it
10 please the Court:

11 In this case, the Ninth Circuit held that a
12 discharge from a point source under the Clean Water Act
13 occurred in the Los Angeles and San Gabriel Rivers based
14 upon the fact that water moved from channelized portions
15 of the Los Angeles and San Gabriel Rivers into what it
16 termed, quote, "naturally occurring portions of those
17 rivers."

18 The court emphasized, in fact, that the
19 discharge occurred because it moved through the concrete
20 portions. And in the words of the court itself, found
21 at the cert appendix at 44, it was, "again discharged to
22 the rivers," and the "again" meaning that it was
23 prior -- at prior time it was in the rivers.

24 This is completely contrary to the Court's
25 decision in Miccosukee Tribe, where the Court held that

1 there cannot be a discharge for purposes of the MPDS
2 permit program and the Clean Water Act based upon the
3 mere transfer of water within a single body of water.

4 All the parties to this case agree that is
5 the correct rule. Virtually all the amici agree that is
6 the correct rule. And it's our view that that is
7 dispositive of this case. It is the only live issue
8 before this Court from the Ninth Circuit, and it
9 dictates --

10 JUSTICE SOTOMAYOR: So why don't we just
11 remand and let it sort it out under the right
12 understanding of the legal rule? Which is basically
13 what the Government is saying, with an added twist
14 because it thinks there is another legal question that I
15 think the Ninth Circuit has answered, but we could go
16 back and forth on it.

17 MR. COATES: Correct. At minimum, a
18 reversal is warranted, without a doubt, but I think
19 given the record in this case is abundantly clear about
20 what the claims were before the Ninth Circuit and what's
21 going on with these monitoring stations.

22 I mean, these monitoring stations are
23 clearly within the rivers themselves. There is just no
24 dispute about that. Even the Ninth Circuit's opinion,
25 like I said, the language of the opinion

1 suggests that --

2 JUSTICE SOTOMAYOR: Everybody agrees.

3 MR. COATES: Correct. And the reason why I
4 don't think there is an open remand is because there is
5 nothing further in the record really to argue about.

6 At minimum, of course, we would prefer
7 reversal, and it would take an open remand. But I
8 think, given the record in this case, the only live
9 claim before the Ninth Circuit was this discharge theory
10 when they found it in the middle of rivers; and, that
11 being resolved against the Respondents, there is no
12 other live issue.

13 CHIEF JUSTICE ROBERTS: Well, it seems to me
14 that they present a very direct syllogism. You have a
15 permit that sets these monitoring stations where they
16 are. The monitoring stations show exceedances, you have
17 violated your permit. What's wrong with that?

18 MR. COATES: Well, because the nature of the
19 monitoring here.

20 For example, when you look at the permitting
21 question, it doesn't say the monitoring of any
22 permittee. If you look at the permit where it talks
23 about the mass emissions monitoring stations, it talks
24 about measuring discharges and compliance from the MS4,
25 not any individual permittee's MS4.

1 CHIEF JUSTICE ROBERTS: Right. But I
2 understand the argument to be that that's the problem
3 that your permit imposes on you; in other words, that
4 this is where the monitoring station is supposed to be.
5 What is it monitoring if not discharges from the MS4,
6 for which you're responsible?

7 The Government suggests that there could be
8 different rules about whether you have to show the
9 allocation or if that's your responsibility.

10 MR. COATES: Well, I think, again, the rules
11 say that you look at the permit's terms to interpret it.

12 And the Ninth Circuit did look at the
13 permit's terms. I mean, it -- it dealt with this
14 argument, and it noted that there are several factors in
15 the permit that suggest that it didn't relieve the
16 Respondents of the obligation of having to show an
17 actual discharge of water --

18 CHIEF JUSTICE ROBERTS: Well, you don't --
19 you don't question that there was an actual discharge.
20 The storm sewer system in Los Angeles hasn't been shut
21 down, right?

22 MR. COATES: Correct. But, again --

23 CHIEF JUSTICE ROBERTS: So there are
24 discharges, right?

25 MR. COATES: But not discharges of

1 pollutants, and that's what's reported.

2 CHIEF JUSTICE ROBERTS: You don't dispute
3 that there was at least some small amount of pollutant,
4 even below the permit level, from your point sources, do
5 you?

6 MR. COATES: Well, we don't know that. But
7 the -- but the point I want to make --

8 CHIEF JUSTICE ROBERTS: Well, I'm asking you
9 whether -- I mean, isn't it -- doesn't common sense
10 suggest -- you have asked in your permit for a limit on
11 how much of a --

12 MR. COATES: Sure.

13 CHIEF JUSTICE ROBERTS: -- particular
14 pollutant you can discharge.

15 MR. COATES: But, again --

16 CHIEF JUSTICE ROBERTS: You wouldn't do that
17 unless you expected to discharge some.

18 MR. COATES: Right. You might do it
19 sometimes, you might do it others, you might do it in
20 concentrations that would cause or contribute to the
21 exceedances; but, you still have to have a discharge
22 that causes or contributes to the exceedances.

23 CHIEF JUSTICE ROBERTS: Well, why did you
24 put the monitoring sources where they are if that wasn't
25 what was going to measure your compliance with the

1 permit?

2 MR. COATES: Because you're required, in a
3 system-wide permit like this, to suggest -- to propose
4 monitoring which is subject to the approval of the
5 regulatory agency.

6 And it's a question of monitoring of what?
7 Not monitoring of any individual permittee's discharge.
8 In fact, it's not designed for that. We even presented
9 evidence in the district court to that effect.

10 CHIEF JUSTICE ROBERTS: Well, the Government
11 says that that question -- you're saying, I understand,
12 there are other discharges -- well, you're by far the
13 dominant discharger, but I understand there are others,
14 and they may contribute as well to what the monitoring
15 station says.

16 But the Government's position is that, well,
17 that's how you wrote the permit without any allocation;
18 and, that whatever allocation issues you have may be
19 between you and the other dischargers, but that doesn't
20 affect the showing of liability.

21 MR. COATES: Well, except for the fact that
22 the permit terms themselves say that each permittee is
23 only responsible for its own discharge.

24 If you read the permit in the general
25 fashion that the Respondents wish, then you're not

1 responsible only for your own discharge. It's
2 essentially you're in immediately and responsible for
3 all of them until you prove otherwise. And that's just
4 not how the permit reads.

5 CHIEF JUSTICE ROBERTS: Where is that? I
6 know we've got the permit. Where does it read that way?

7 MR. COATES: Let's see. At the Joint
8 Appendix, page 93, G, 4.

9 JUSTICE KENNEDY: What page again?

10 MR. COATES: Volume I of the Joint Appendix,
11 page 93, and it's the fourth paragraph. And it's at the
12 very bottom of the fourth paragraph: "Each permittee is
13 responsible only for discharge for which it is the
14 operator."

15 JUSTICE KENNEDY: Suppose that the district
16 has 85 percent of the water by volume that's put into
17 this river, and then you have this high pollution index.
18 Does that make it an easier case for the challengers, or
19 is that just irrelevant?

20 MR. COATES: It's just irrelevant unless you
21 show that in that bulk of water there is a higher
22 concentration of pollutants.

23 You could have a major discharger that
24 undertakes more vigorous pollution controls than a
25 smaller discharge. It doesn't necessarily show that

1 you're adding more pollutants necessarily or how those
2 pollutants contribute to exceedances measured at the
3 mass emissions monitoring stations.

4 JUSTICE KENNEDY: Well, I have one different
5 question. This is hypothetical. It's not in the case.
6 It's just for me to understand.

7 Suppose you have the river, and part of it
8 is a concrete bank, and then there's a more natural
9 bedding and then another concrete bank.

10 And when the -- in the dry season they fix
11 the concrete bank, but they use bad concrete. And a lot
12 of pollutants are coming out of the concrete, but it is
13 in the river. Is that a discharge under this statute?

14 MR. COATES: I don't believe so. Although,
15 I could --

16 JUSTICE KENNEDY: Would there be any --

17 MR. COATES: -- imagine circumstances where
18 you create an outfall unintentionally by -- by
19 funneling. I mean, I think you're talking about just
20 natural erosion of turbidity or whatever into the river.
21 I don't believe that would necessarily be a point
22 source.

23 It might be a non-point source pollution,
24 but I don't believe that would necessarily be a point
25 source if it's just inadvertently, you know,

1 deteriorating in the river.

2 JUSTICE KENNEDY: And that's -- that's a
3 separate part of the statute, nonpoint source
4 pollutions.

5 MR. COATES: Well, it doesn't sound like,
6 you know, the -- the way it's defined under 1362 is a,
7 you know, like, enclosed conveyance that -- that
8 discharges --

9 JUSTICE KENNEDY: Well, that's not in this
10 case.

11 MR. COATES: Yes, that's not in this case.
12 But I think --

13 JUSTICE KENNEDY: It was just a background,
14 background question for you.

15 MR. COATES: Yes, but I think that that --
16 that probably wouldn't be a discharge from a point
17 source.

18 JUSTICE SCALIA: Mr. Coates, I am -- I am
19 still perplexed.

20 MR. COATES: Yes.

21 JUSTICE SCALIA: You say, and it seems to be
22 correct, that each -- each alleged polluter is only
23 responsible for his own pollution, but you also say that
24 these monitors are so situated that it is impossible to
25 tell from the monitor who is responsible for the

1 pollution. Is that right?

2 MR. COATES: I think that -- I think that is
3 right, but you look for the --

4 JUSTICE SCALIA: So whose fault is that?

5 MR. COATES: Well, the reason why, the
6 reason why that that's there, is to measure essentially
7 the health of these rivers so that you can fine tune the
8 MS4 permit, the systemwide permit, and so that you can
9 gauge general water quality standards, and if necessary
10 you can fine tune it to try and measure individual
11 permittees.

12 And we note that there is a renewed permit.
13 It still has the monitoring stations in it, so under the
14 Ninth Circuit's decision we would still be discharging
15 at those monitoring stations. But it does provide for
16 outfall monitoring at representative outfalls for
17 individual permittees to do precisely that kind of
18 correlation that we are talking about.

19 JUSTICE SCALIA: What -- what it is -- what
20 is it that provides for that?

21 MR. COATES: There is a renewed permit. The
22 permits are renewed every 5 years. This is -- we are on
23 the third permit now; this is the fourth; it's gone 10
24 years. The renewed permit continues the mass emission
25 station, so, as I mentioned, we are still discharging in

1 middle of the river as far as the Ninth Circuit is
2 concerned. But it does have provisions for additional
3 monitoring near outfalls, along the banks of the rivers,
4 for various permittees, so that in the future you could
5 look at that testing and go: Boy, your outfall is
6 producing X, Y and Z.

7 JUSTICE SOTOMAYOR: So this was a regulatory
8 void?

9 MR. COATES: This was a --

10 JUSTICE SOTOMAYOR: A regulatory void that
11 these -- that there was no requirement previously that
12 you monitor the outfalls?

13 MR. COATES: Monitoring, correct, that there
14 be specific outfall monitoring. It's a regulatory --

15 JUSTICE SOTOMAYOR: So how do you envision
16 this permit was -- by the way, just one side question
17 and then to this one.

18 I thought the Ninth Circuit basically
19 endorsed your view that under the permit you're not --
20 you're only responsible for your own pollution.

21 MR. COATES: That is correct.

22 JUSTICE SOTOMAYOR: So it has resolved this
23 issue.

24 MR. COATES: It has resolved this issue.

25 JUSTICE SOTOMAYOR: All right. So that's

1 why I ask why remand and why you're saying why remand.

2 MR. COATES: Yes.

3 JUSTICE SOTOMAYOR: But putting that aside,
4 how do you think the system was supposed to work before?

5 MR. COATES: Well --

6 JUSTICE SOTOMAYOR: Did you have any
7 obligation, once you saw the excess pollutants, to start
8 the reiteration process to try to figure out who was the
9 cause of this?

10 MR. COATES: Well, if they attribute a -- a
11 violation to a particular permittee -- for example, the
12 district court noted and the Ninth Circuit re-emphasized
13 that you could at least, if you wanted to try and hook
14 it to a single permittee, you could at least try and
15 sample at an outfall for that permittee and then provide
16 evidence that that contributed to exceedances. They
17 didn't do that here, in the lower court.

18 JUSTICE SOTOMAYOR: You mean the Respondents
19 could have done that here?

20 MR. COATES: The Respondents could have done
21 that here. They did not argue that they did that in the
22 Ninth Circuit. They abandoned that, that contention.

23 CHIEF JUSTICE ROBERTS: So what -- what
24 percentage of discharges come from you as opposed to the
25 other members of the MS4 --

1 MR. COATES: We have -- we have the most
2 infrastructure. I don't know the specific percentage,
3 but bear in mind that there are 1,400 other entities
4 upstairs --

5 CHIEF JUSTICE ROBERTS: Give me an estimate?

6 MR. COATES: You know, I can't in terms of
7 total water volume. But we are -- we are the largest
8 player in that portion of the system. I'm not going to
9 downplay that.

10 What I'm saying is that there is no
11 necessary correlation between that and ipso facto you're
12 the one causing the exceedances at the monitoring
13 stations; that again there has to be something traceable
14 to our discharge that contributes to those exceedances.

15 CHIEF JUSTICE ROBERTS: What -- what goes
16 into these discharges besides the rainwater runoff?

17 MR. COATES: Here it's just stormwater.

18 CHIEF JUSTICE ROBERTS: Okay.

19 MR. COATES: I mean, a municipal separate
20 storm sewer system --

21 CHIEF JUSTICE ROBERTS: So your -- your
22 hypothesis is in some of these minority dischargers,
23 that for some reason their rainwater would have a
24 different amount of pollutants than your rainwater?

25 MR. COATES: Well, they could -- they could

1 very well have storm discharge different. Yes, there
2 are other discharges upstream from -- there are
3 industrial sites that discharge water into the L.A.
4 River. So -- no, absolutely. Absolutely. And again,
5 you know, a large jurisdiction, we may be more proactive
6 in terms of doing pollution control as well.

7 There is just no automatic correlation to
8 that. And I think, as the district court said, you
9 know, it's not so much to ask to at least sample at one
10 outfall to try and show that kind of correlation so you
11 can show exceedances at the margin.

12 JUSTICE KAGAN: I'm sorry --

13 JUSTICE KENNEDY: Was the Ninth Circuit's
14 error -- was the Ninth Circuit's error here a factual
15 one, because it was based on the location of the
16 stations, or was it a legal one because it
17 misinterpreted our Miccosukee case?

18 MR. COATES: It -- it's a legal one. I
19 don't believe it's a factual mistake, for a couple of
20 reasons. One, the language that -- that I cited, that's
21 in the cert appendix at 44, where it talks about the
22 water again discharged to the river, suggests that that
23 water was in the river and now it's moving through our
24 concrete channels and it's again discharged into the
25 river. Its distinction that it draws is that there is

1 something different because the MS4 is an intrastate
2 manmade construction as opposed to a naturally recurring
3 river, which talks about the distinction being made in
4 that regard.

5 And finally, the record is just abundantly
6 clear on where these monitoring stations are. The
7 opinion itself at cert appendix page 18, footnote 4
8 cites our website as to location of the monitoring --
9 for the location of the monitoring stations, and that
10 website clearly says they are within the Los Angeles and
11 San Gabriel Rivers. And in fact appellant's brief, the
12 Respondents' brief in the lower court, specifically said
13 the same thing.

14 JUSTICE SOTOMAYOR: You just said there were
15 polluters upstream. Are those industrial polluters
16 upstream --

17 MR. COATES: There are -- there are --

18 JUSTICE SOTOMAYOR: -- or industrial
19 facilities, are they within your MS4?

20 MR. COATES: They are not. They have
21 separate NPDES permits.

22 JUSTICE SOTOMAYOR: But what you're saying
23 is that there are different outfalls from different
24 people into the same river.

25 MR. COATES: Correct. Correct.

1 JUSTICE SOTOMAYOR: All right. So we don't
2 know whether the outfall is from your MS4 or from some
3 other source?

4 MR. COATES: Correct, because they are all
5 upstream of the monitoring station.

6 JUSTICE BREYER: Okay. So you say they have
7 two remedies. The NRDC if they think you are polluting
8 could have done -- could do two things. One, they could
9 go and get some expert to try to get a sample or to make
10 an estimate based on what he knows about the industrial
11 sites that it's actually your storm drains that are
12 polluting. That's one thing they could do; you say they
13 didn't do it.

14 Okay; the second thing they could do is they
15 go to the permitting authority and they could say: Will
16 you please ask the L.A. County to monitor the actual
17 storm drains when they come in, a sample thereof. And
18 you're saying they could have done that, but they don't
19 have to now, because now that is a requirement and we
20 are doing it.

21 MR. COATES: That's correct.

22 JUSTICE BREYER: Okay.

23 MR. COATES: That's correct. That's
24 correct. That's correct.

25 CHIEF JUSTICE ROBERTS: Okay. Where is that

1 requirement?

2 MR. COATES: Excuse me?

3 CHIEF JUSTICE ROBERTS: Where is that

4 requirement that you're now doing?

5 MR. COATES: We, in our reply brief we cite
6 the fact that a -- a -- the permit has just been
7 renewed. We are waiting for the final version to go on
8 line and to see it. I think what we cite to the Court
9 is the last one that was before the regional board. It
10 lines -- it lines out.

11 CHIEF JUSTICE ROBERTS: So you are not doing
12 it now?

13 MR. COATES: We are not doing it now. I
14 mean, the new permit is technically effective. It could
15 be stayed if someone challenges it. I think it's open
16 until challenge until December 11th. But under the
17 renewed permit there is outfall monitoring, specific
18 outfall monitoring. Now, the mass emission station is
19 still there, and under the Ninth Circuit's opinion we
20 are still discharging there and responsible for the
21 exceedances.

22 So -- but that's the type of monitoring that
23 plaintiffs want and that's in the new permit. If they
24 want it in the last permit they would have disputed it;
25 they could have contested the last permit. But they

1 didn't do so. This is a fine tuning program. I mean,
2 municipal stormwater is a complex issue. Congress
3 didn't treat it the same way it did industrial
4 stormwater.

5 JUSTICE KENNEDY: Is it your position that
6 the rivers -- the two rivers in question are outside the
7 MS4? I thought there was a suggestion in the
8 Government's brief that you could have both the river
9 and the MS4 that could cover the same area.

10 MR. COATES: We have -- in the lower courts
11 the district personnel refer to the channelized portion
12 as part of our MS4 because it's all flood control to us.
13 However, we have never said it's all the same for
14 purposes of a discharge. We've been very careful about
15 that, that for a discharge from a point source, an
16 outfall, not the monitoring stations -- in fact, in the
17 district court plaintiff somewhat argued that theory,
18 the monitoring stations, when you're MS4 they're
19 exceedances; ergo, exceedances in your MS4. And we
20 pointed out under Miccosukee there is no discharge of
21 water. There's no discharge because it's merely
22 transferring water as water moves past the monitoring
23 stations.

24 JUSTICE GINSBURG: What was the purpose of
25 having the monitoring station if nothing can be done?

1 And are -- the monitoring shows yes, there is a lot of
2 pollutants in there, and we know that at least some of
3 them have to be ascribed to the district. But you say
4 unless you show the outflow, that it comes from there,
5 no liability.

6 Why shouldn't it be that, given there is
7 going to be a contribution that the district is making,
8 that the district should have the burden of showing, no,
9 there are all these other ones out there, so our
10 percentage is X, not the whole thing?

11 MR. COATES: Well, again, the Water Act
12 makes you responsible for a discharge in violation of
13 permit terms, so you have to have a discharge by the
14 permittee.

15 The permit terms itself are not written in
16 that fashion. Again, it says we are only responsible
17 for our own discharge. Could you write a permit that
18 way? Perhaps. But this permit was not written that
19 way.

20 And, in fact, the Ninth Circuit agreed with
21 us on that. The permit language is not tricky on that.
22 You could have permittee monitoring. You could. And
23 that's what the renewed permit does. But that is not
24 this permit.

25 The regional board -- as I said, it's part

1 of a process. There have been three permits over the
2 last -- since 1990. And we have a fourth permit, and it
3 has some new provisions to fine tune it for precisely
4 this reason.

5 I note that -- the biggest dispute we seem
6 to have on this monitoring issue, and it's one that I
7 think the discussion we are having bears out, is that it
8 is not a straightforward issue; that when you look at
9 the statute itself, the statute 1342(p)(3) distinguishes
10 between industrial stormwater dischargers and municipal
11 stormwater discharges.

12 Now, I think it is worth looking at that
13 provision, because if you look at (A), and that talks
14 about industrial dischargers, it says they have to meet
15 every requirement of this provision. And if you go to
16 1342(a), it includes everything, including the
17 monitoring requirements of 33 U.S.C. 1318.

18 But if you look at 1342(p)(3), subdivision
19 (B), which talks about municipal stormwater, you do not
20 see that language. You do not see that "must comply"
21 with every other provision of this section. It doesn't
22 say that.

23 It only has essentially three requirements,
24 which is, these permits can be granted on a system-wide
25 or jurisdiction-wide basis, you have to only allow

1 stormwater, and that the -- must provide to try and
2 manage pollutants to the maximum extent practicable.
3 And that's the sum total of it.

4 So I don't think you can assume that these
5 are identical monitoring requirements. It's, at the
6 very least, a complex question. I think it's one that
7 would have behooved the Court to be able to obtain more
8 amicus assistance on. And part of it is the way that
9 this was raised to this Court, that this was a proper
10 issue for a cross-petition. And the only justification
11 I've seen for this is I saw a letter come to the Court
12 advising it of two cases, I think, *LaTule v. Scofield* --
13 I don't know if it's *LaTule* or *LaTool* -- and *Oriason v.*
14 *United States*. And neither of one of those suggest that
15 this is an appropriate issue for the Court.

16 JUSTICE SCALIA: Is -- is your description
17 of the statute meant to conclude, or does it -- does it
18 conclude, that these outsource monitoring stations which
19 exist under the new permit are not really required?

20 MR. COATES: Well, not necessarily
21 statutorily required, but they are part of the permit,
22 yes. They're in there. They're in there. We're not --

23 JUSTICE SCALIA: Oh, I understood that.
24 Yes.

25 MR. COATES: We've agreed --

1 JUSTICE SCALIA: Can you put in the permit
2 stuff that the statute does not require?

3 MR. COATES: Well, you can -- I think you
4 can agree to terms in a permit, yes.

5 JUSTICE SCALIA: Okay.

6 MR. COATES: Yeah.

7 And with that, I would reserve the balance
8 of my time for rebuttal.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Shah.

11 ORAL ARGUMENT OF PRATIK A. SHAH,
12 FOR UNITED STATES, AS AMICUS CURIAE

13 MR. SHAH: Mr. Chief Justice, and may it
14 please the Court:

15 The answer to the question presented in this
16 case is both straightforward and undisputed.

17 Under this Court's decision in *Miccosukee*,
18 no addition, and thus, no discharge of pollutant occurs,
19 when water flows from a channelized portion of a river
20 to a downstream portion of that same river.

21 Because the monitoring stations at issue are
22 actually located within the rivers themselves, the court
23 of appeals erred in concluding that a discharge of
24 pollutants occurred when, quote, "the still-polluted
25 stormwater flowed out of the concrete channels where the

1 monitoring stations are located, through an outfall and
2 into the navigable waterways."

3 And because the court of appeals rested its
4 liability determination on that erroneous premise, the
5 judgment should be vacated and the case remanded to the
6 court of appeals.

7 JUSTICE GINSBURG: Mr. Shah, what about the
8 problem that one of the amici brought up concerning
9 dredged material? Said that if we just say Miccosukee
10 applies, then when there's a dredging operation and the
11 material is redeposited back into the same water, then
12 that would also -- there would be no responsibility
13 based on that.

14 MR. SHAH: Right. Your Honor, I think -- I
15 think the one amicus that does raise that issue raises
16 it limited to -- the biggest counterexample they raise
17 is the one that you raise about Section 404 permits for
18 dredged and fill material. Those permits are just very
19 different in kind.

20 Section 404 applies to dredged and fill
21 material, which almost by definition is going to be
22 coming from the source itself. And so we think that the
23 Miccosukee line of decision just doesn't apply to that
24 permitting regime, which -- which is a very different
25 sort of permitting regime than we have at issue here.

1 And in any event, I think it's far beyond
2 the question presented in this case, the Miccosukee
3 rule.

4 JUSTICE SOTOMAYOR: Counsel, tell me why
5 remand? I thought -- and correct me at whatever step
6 I'm wrong, okay -- that the district court rejected
7 Respondents' argument that the mere monitoring excesses
8 created liability. What it said is you have to follow
9 the terms of the permit and make the permittee
10 responsible only for their excess discharges, and you
11 haven't shown us any evidence that does that.

12 The Ninth Circuit agreed that the permittee
13 is only liable for its own discharges. It held the
14 permittee liable because it believed that the discharges
15 were within their source, within their outflow.

16 So what are we remanding for? The legal
17 question of whether the -- the -- the monitoring
18 stations automatically create liability has been
19 answered in the negative by both courts.

20 MR. SHAH: Justice Sotomayor, I agree with
21 your reading of both opinions below.

22 I think what we're asking for is the Court
23 to do what it normally does when it vacates an erroneous
24 part of a judgment and sends it back, that is, leave it
25 open to the court of appeals to address any issues

1 consistent with this Court's opinion.

2 We think it's conceivable that the Ninth
3 Circuit might approach the permit construction issue
4 differently once it's corrected of the misimpressions --

5 JUSTICE SOTOMAYOR: How would it --

6 MR. SHAH: -- that it had before it.

7 JUSTICE SOTOMAYOR: -- what could it do
8 differently?

9 MR. SHAH: I think, in particular, the Ninth
10 Circuit construed this permit on the understanding that
11 there was a discharge of polluted water after it flowed
12 past the monitoring station and said that the district
13 could be liable based simply on the exceedance measured
14 by the mass emission station alone.

15 JUSTICE SOTOMAYOR: How does that change the
16 answer to the legal question that the permittee -- both
17 courts have said the permittee is only liable for their
18 own discharges. And unless this proves that they
19 discharged, they themselves discharged, which it can't
20 because it's in the river and not within the source --

21 MR. SHAH: Well, it --

22 JUSTICE SOTOMAYOR: -- how can that alone
23 establish liability?

24 MR. SHAH: Well, again, I think the Ninth
25 Circuit predicated its permit interpretation on the

1 understanding that there would be at least some way to
2 hold a permittee -- in this case, the district -- liable
3 based on the mass emission exceedance alone, and that's
4 because it misapprehended that there would be a
5 discharge of flow of the polluted water.

6 It could be, and it may not be. We don't
7 know until it gets back to the Ninth Circuit. It may be
8 that the Ninth Circuit would reject the view that you
9 could have a permit that sets up a permitting regime
10 that does not allow a plaintiff to sue any particular
11 permittee unless it has evidence beyond that provided by
12 the monitoring regime.

13 JUSTICE SCALIA: So -- so -- so what follows
14 from that; that the district is liable because it's a
15 lousy permit?

16 MR. SHAH: Well, Your Honor, if --

17 JUSTICE SCALIA: I do not see how this
18 court -- how the -- how the court of appeals is going to
19 be able to do anything different other than say there's
20 no liability here, unless, of course, it adopts another
21 fanciful interpretation of the statute, which is
22 something I worry about.

23 MR. SHAH: Well, Your Honor, we think that
24 this permit -- again, the terms of this permit are both
25 complex and ambiguous. We do not think that permits

1 should be written this way. We think permits that
2 provide for water quality -- for MS4s to adhere to water
3 quality standards based on ambient monitoring should be
4 coupled with either individual --

5 JUSTICE SCALIA: I -- I agree with that, but
6 how can this permit possibly be interpreted in such a
7 way as to hold a district liable?

8 MR. SHAH: Well, I think the most persuasive
9 -- and, again, we don't take a firm position on this,
10 but I think the most persuasive argument on the other
11 side would be that when permit writers issue a permit,
12 they -- they assume that the permitting regime provided
13 in the permit would provide a basis to seek enforcement
14 of that permit.

15 If that were true --

16 JUSTICE SCALIA: They would assume that;
17 but, if it doesn't, it doesn't.

18 MR. SHAH: Well --

19 JUSTICE SCALIA: So what do you do if it
20 doesn't?

21 MR. SHAH: Well, one could imagine a regime
22 where the permittees, that is, the municipalities who
23 apply for a joint permit, would agree to a shared
24 presumption of liability.

25 For example, there are --

1 JUSTICE SCALIA: They have -- they have not
2 agreed.

3 MR. SHAH: Well, again, we don't --

4 JUSTICE SCALIA: So you're going to impose a
5 shared thing? I see no way for the court of appeals to
6 do this in -- in a fashion that will not bring the case
7 right back here, and you'll be asking us to send it back
8 to the same panel.

9 MR. SHAH: Well, Your Honor, I don't think
10 it's a cert-worthy issue, how to interpret the terms of
11 this specific -- this is a fairly --

12 JUSTICE BREYER: But, anyway, you say that
13 the court held the same thing in two other cases
14 involving two other rivers, and they didn't cross-appeal
15 from that, and so that issue isn't really in front of
16 us.

17 MR. SHAH: Well, Your Honor --

18 JUSTICE BREYER: And if they did hold what
19 you said, then they'd have to reopen the other two
20 cases.

21 MR. SHAH: Right. You Honor, I think in
22 terms of the cross-petition issue, that is a closed
23 question. I don't think the Court needs to get near it,
24 because I think there are several other good reasons why
25 this Court should not decide the

1 permit construction issue itself.

2 JUSTICE BREYER: Okay. But if we decide
3 that they needed file a cross-petition and they didn't,
4 then what's the basis for our remanding rather than
5 reversing?

6 MR. SHAH: Well, Your Honor --

7 JUSTICE BREYER: It's that issue that what
8 we have to decide.

9 MR. SHAH: Your Honor, it's established that
10 this Court -- even if a cross-petition were required,
11 it's established that this Court has the authority to
12 remand for disposition of any further issues once a case
13 comes before this Court. So the cross-petition --

14 JUSTICE SOTOMAYOR: Why should we in light
15 of the clarity of the permit? That's the question
16 Justice Scalia is asking.

17 MR. SHAH: Sure. I think the Court should
18 just follow its ordinary practice. We're not asking for
19 anything different than its ordinary practice of
20 vacating the judgment and remanding for further
21 proceedings consistent with its opinion.

22 JUSTICE SCALIA: But that is not our
23 ordinary practice when nothing can happen on remand
24 except -- except to give judgment for the Petitioner
25 here.

1 MR. SHAH: Well, I think it would be unusual
2 for the Court to reverse and then instruct that judgment
3 be entered in favor of Petitioner. Of course, the Court
4 is free to do that and it may decide to do that. We
5 just think that there is a possibility that the Ninth
6 Circuit would -- would take a different approach.

7 JUSTICE BREYER: Sometimes the Court says in
8 the bottom line in that italicized thing, which I've
9 never fully understood when and when we don't do it, but
10 it just says "Reversed."

11 MR. SHAH: Right.

12 JUSTICE BREYER: And then sometimes it says
13 "it is so ordered." And exactly when you write the word
14 "Reversed" -- but I usually just ask the Clerk, all
15 right.

16 But the question -- the question is when do
17 we do the one or the other, and I think here what
18 they're saying is: Just write the word "Reversed,"
19 we'll deal with the rest of it. All right. So
20 that's --

21 MR. SHAH: Right. And again, the Court is
22 well within its -- its discretion to do that. We
23 think --

24 CHIEF JUSTICE ROBERTS: Doesn't that always
25 say that in the judgment of the Court?

1 MR. SHAH: Doesn't it always say what, Your
2 Honor?

3 CHIEF JUSTICE ROBERTS: Does it say "It is
4 so ordered" in the judgment that we release?

5 MR. SHAH: Yes, yes. And I think the
6 typical -- I think the typical phrasing would be vacate
7 and -- and remand for further proceedings.

8 JUSTICE GINSBURG: Mr. Shah, am I right
9 about that this other theory, if it were open to the
10 Ninth Circuit, would apply equally to the other rivers
11 that Justice Breyer mentioned, and those were out of the
12 case because when it got to the Ninth Circuit we were
13 talking about only the Los Angeles and the San Gabriel?

14 MR. SHAH: That's right, Your Honor.

15 JUSTICE GINSBURG: That -- that other theory
16 would apply to all four.

17 MR. SHAH: I -- I think that is correct and
18 the Ninth Circuit may decide that therefore it's not
19 going to revisit its permit interpretation. I think it
20 might be within the Ninth Circuit's discretion since it
21 still has the case on remand if it were to revisit its
22 permit construction.

23 CHIEF JUSTICE ROBERTS: The reason it would
24 not look at Malibu and -- what's the other one that
25 we're already --

1 MR. SHAH: The other watershed.

2 CHIEF JUSTICE ROBERTS: Yes, would be
3 because it wouldn't comply with the cross-petition rule.

4 MR. SHAH: No.

5 CHIEF JUSTICE ROBERTS: We're are not going
6 to send it back to them to --

7 MR. SHAH: I'm sorry. I thought it would be
8 that the rationale that they used for those two rivers,
9 it would be in tension with it, and if they agree that
10 the rationale which led them to deny -- to deny
11 liability on those two rivers, that may lead them to
12 adhere to its current permit interpretation.

13 CHIEF JUSTICE ROBERTS: Do -- do you have a
14 position on the cross-petition issue?

15 MR. SHAH: No, Your Honor, we do not.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MR. SHAH: Thank you.

18 CHIEF JUSTICE ROBERTS: Mr. Colangelo.

19 ORAL ARGUMENT OF AARON COLANGELO

20 ON BEHALF OF THE RESPONDENTS

21 MR. COLANGELO: Mr. Chief Justice, and may
22 it please the Court:

23 We do not defend the judgment on the Ninth
24 Circuit's stated rationale, but on alternative grounds
25 that are properly before this Court. The compliance

1 monitoring included in the permit determines
2 Petitioner's liability for permit violations as a matter
3 of law, as the Clean Water Act, EPA regulations, and the
4 permit's own terms all require.

5 CHIEF JUSTICE ROBERTS: Well, where is the
6 permit's own terms? Your friend cited JA 93, which says
7 each permittee is responsible only for a discharge for
8 which it is the operator. So where does the permit
9 clearly show the opposite?

10 MR. COLANGELO: Your Honor, let me point you
11 to three provisions in the permit that, taken together,
12 compel this result. The first is page 195 of the joint
13 appendix, the paragraph numbered D(1). And this refers
14 to the individual permittees and it says: "Each
15 permittee must comply with all of the terms,
16 requirements, and conditions of this order. Any
17 violation of this order constitutes a violation of the
18 Clean Water Act, its regulations, and the California
19 Water Code and is grounds for enforcement action."

20 And that's the first of the three
21 provisions, and it is undisputed here that there are
22 permit violations. The monitoring included in the
23 permit that Petitioner and its co-permittees chose has
24 demonstrated since 2003 undisputed permit violations.

25 The second provision is page 98 --

1 JUSTICE SCALIA: Wait. But -- but before
2 you go further, it says each permittee must comply. It
3 doesn't say that each permittee shall be responsible or
4 shall be liable. And it's the other provision that says
5 that each permittee is responsible only for a discharge
6 for which it is the operator.

7 MR. COLANGELO: Correct.

8 JUSTICE SCALIA: So you got more --

9 MR. COLANGELO: Yes, You Honor.

10 JUSTICE SCALIA: -- more besides 195.

11 MR. COLANGELO: Well, and what 195 adds is
12 it says any violation is grounds for enforcement action.

13 Now, JA 98 talks about exactly this
14 circumstance when violations are detected at the
15 monitoring stations. And about halfway down JA 98, it
16 says if exceedances of water quality objectives or water
17 quality standards persist -- and that's only measured in
18 one place; that's at the compliance monitoring in the
19 rivers -- notwithstanding implementation of control
20 measures and other requirements of this permit, quote,
21 "the permittee individually, the permittee shall assure
22 compliance with discharge prohibitions and receiving
23 water limitations by complying with the following
24 procedure."

25 It then sets out four steps that each

1 permittee must comply with to bring the MS4 within the
2 permit limits.

3 Now, that is --

4 JUSTICE SCALIA: Of course, the very first
5 step is A, "Upon a determination by either the permittee
6 or the regional board that discharges are causing or
7 contributing to an exceedance of an applicable water
8 quality standard, the permittee shall promptly notify,"
9 et cetera. They cannot make such a determination
10 because of the nature of the monitoring here.

11 MR. COLANGELO: That's -- that's incorrect,
12 Your Honor. The permit compels this result because
13 there is only one place in the permit that that
14 monitoring is required and that is the in-stream mass
15 emission stations that the permittees chose, and the
16 permit says explicitly the monitoring results at those
17 locations are used to assess compliance and determine
18 whether the MS4 is contributing to violations.

19 JUSTICE BREYER: But as I read it and he
20 explained it, I thought that, look, what they're
21 thinking is this. Stormwater is really a big problem
22 and it's really complicated how you work it out, and we
23 want the agencies to work it out. So the purpose of
24 this monitoring thing is we first determine that there
25 is an exceedance.

1 Now, once we determine that there is an
2 exceedance, which is the point of this pertinent
3 particular requirement, then we're going to go on to
4 decide who. And what we're going to do is leave you
5 with two possible choices. One is you can try to figure
6 out who, which means you've got to get an expert and
7 monitor it; or let us now have a new permit which
8 will -- will, you know, which will -- which will put
9 some responsibility on the individuals, because we'll
10 monitor higher up the river.

11 Now, that's a rational way for an agency to
12 proceed and it leaves you with pretty good remedies.
13 And so why -- why are we running all around trying to
14 work this thing out. Why don't you just sort of try to
15 deal with it as they described it and say okay, we're
16 going to either prove you did it before or at least we
17 can prove it now?

18 MR. COLANGELO: There are two answers to
19 that, Your Honor. The first is this is all sorted out
20 during the permitting process. This permit was adopted
21 by the State agency and upheld by State courts upon the
22 Petitioner's challenge after 5 years of litigation. The
23 permit was based on an 80,000 page administrative record
24 and the testimony of 29 witnesses. And the point of
25 this process is that permit terms are fixed once the

1 permit is finalized and approved by the courts.

2 Now, the reason we didn't challenge the
3 permit at the time is that we were defending the permit
4 alongside the State agency as an intervenor against
5 Petitioner's challenge. Petitioner in State court for
6 years made exactly the opposite argument that it makes
7 here. It said that it was entitled to a safe harbor
8 provision in the permit to excuse it from liability,
9 because it would be held responsible based on this
10 in-stream monitoring.

11 Now, there may be as a technical or
12 scientific matter better monitoring programs to
13 determine who's putting in what and where exactly it is
14 coming from, but that cannot be reopened upon an
15 enforcement proceeding.

16 JUSTICE GINSBURG: But how do -- the
17 district is a big contributor, but there are other
18 contributors. So, on your theory, how do we determine
19 what is the share that the district would be liable for?

20 MR. COLANGELO: Your Honor, the permit
21 includes a blueprint that sorts that out, and it
22 parallels the traditional notion of several liability.
23 Where there are multiple contributors to a single harm,
24 each is responsible for its share --

25 JUSTICE KENNEDY: But you still have to show

1 that there is a contributor. And I've been through
2 these sections, and it seems to me that a reasonable
3 interpretation of this section is that there is a
4 violation if a particular permittee violates.

5 And what I'm taking away from your argument
6 is that once there is a violation, all the permittees
7 are liable. That just can't be.

8 MR. COLANGELO: It can be, Your Honor, and
9 that's the -- that's the solution that the permit works
10 out and that the permittees negotiated for in advance.

11 JUSTICE SCALIA: What's the third section,
12 Mr. Colangelo? I'm waiting breathlessly for your third
13 section. You said there were three.

14 MR. COLANGELO: The third, Your Honor --

15 JUSTICE SCALIA: I've got 195. I've got 98.
16 Where is the third one?

17 MR. COLANGELO: The third, Your Honor, is JA
18 109.

19 JUSTICE SCALIA: 109.

20 MR. COLANGELO: And this parallels a
21 provision in EPA's regulations.

22 At the very bottom of JA 109, subsection D,
23 it says, "The permittee shall carry out all inspection,
24 surveillance, and monitoring procedures necessary to
25 determine compliance and noncompliance with permit

1 conditions."

2 So the problem with Petitioner's theory is
3 that they are violating this provision of the permit,
4 which is taken virtually verbatim from EPA regulations,
5 which says that the discharger has the responsibility to
6 measure and report its own violations.

7 And stepping back to talk about the Clean
8 Water Act program generally and the discharge permit
9 program generally, no one is entitled to discharge
10 without a permit; a permit fixes terms that must be
11 complied with; and, at the heart of the permitting
12 program is self-monitoring and self-reporting of
13 violations.

14 CHIEF JUSTICE ROBERTS: Looking at 109, it
15 strikes me as a little bit circular to say they have the
16 responsibility to carry out inspection and surveillance
17 and monitoring to ensure compliance with the permit;
18 and, their point is, well, we're not -- we're not not in
19 compliance with the permit because you haven't -- there
20 hasn't been an allocation of the discharges to them.

21 MR. COLANGELO: Well, and the problem with
22 that, Your Honor, is that it leads to no liability ever
23 for the discharger, even though it concedes --

24 CHIEF JUSTICE ROBERTS: Well, I think that
25 might be -- I think that might be right, but that gets

1 back to the question of whether the permit is -- is
2 poorly drafted.

3 MR. COLANGELO: Right.

4 CHIEF JUSTICE ROBERTS: And I guess the idea
5 is they're changing the permit so to cure that problem.

6 MR. COLANGELO: The permit has changed. It
7 is not yet effective, Your Honor, but there is a new
8 permit that will be in effect shortly.

9 But on the question of whether --

10 JUSTICE SCALIA: Well, why -- why do you
11 need that if -- if the present permit covers it as
12 clearly as you say? I mean self -- self-monitoring.

13 MR. COLANGELO: That is absolutely --

14 JUSTICE SCALIA: My goodness, you're going
15 to go through all of this how many -- how long did it
16 take you to challenge this, and blah, blah, blah, blah.
17 Why go through all that if, indeed, the present permit,
18 as you say, is perfectly adequate?

19 MR. COLANGELO: The present permit is
20 adequate. The state agency renewed the permit. That's
21 a matter of course. It changed the monitoring program.

22 The point is that whatever monitoring the
23 state agency sets and that the state courts uphold is
24 the monitoring that determines compliance.

25 JUSTICE GINSBURG: Well, wouldn't you

1 still -- I'm not clear if you gave me an answer to how
2 the district share would be determined. It is not the
3 only polluter. Are you saying each permittee is
4 responsible for the whole?

5 MR. COLANGELO: No, Your Honor. That's
6 joint and several liability.

7 And here, JA 93, which Petitioner cites,
8 says that each permittee is responsible only for its
9 discharges. That's just --

10 JUSTICE GINSBURG: So how do we find out
11 what is its part -- what is its share?

12 MR. COLANGELO: The permit sets that out.
13 The permit says, once a violation is detected, each
14 permittee has to go back upstream, conduct enhanced
15 monitoring to identify the particular sources of
16 pollution within its jurisdiction, control those
17 sources, but only those within its jurisdiction, and
18 continue that process until the problem is resolved.

19 JUSTICE KENNEDY: Is that the 109 language
20 you cite?

21 MR. COLANGELO: No, Your Honor. That's at
22 both 98, which I cited second, and page 213.

23 JUSTICE BREYER: Okay. So the upshot would
24 be, however, as I understand it, and correct me if I'm
25 wrong, that since they're doing that now anyway under

1 the new permit -- and you can question my hypothetical
2 assumption there -- but if they are doing it under the
3 new permit, then the only result of your winning this
4 would be to transfer the running of the district from
5 the agency to the court. And I suspect the Ninth
6 Circuit knows less about it than you participating in
7 a -- some kind of negotiation with the agency.

8 MR. COLANGELO: No, not at all, Your Honor.
9 The Petitioner retains the authority and, indeed, the
10 responsibility to identify the particular sources within
11 its jurisdiction that are causing the problem and
12 abating only those. So it is limited, in response to
13 Justice Ginsburg's earlier question, only to its own
14 share.

15 There is no question that there are other
16 contributors, but the permit doesn't impose a violation
17 only upon the entity who is the sole cause. There
18 are -- there are many polluters that discharge into
19 these rivers. The permit specifically says it is
20 unlawful to cause or contribute to a violation of water
21 quality standards. So prohibiting a contribution
22 assumes that there will be other contributors and that
23 the Petitioner will not be the sole cause.

24 CHIEF JUSTICE ROBERTS: Well, this is all
25 fine and good. Your friend, though, says you should

1 have cross-petitioned because the relief you seek
2 expands the judgment below, and there are all these
3 cases saying you can't do that.

4 MR. COLANGELO: Your Honor, the relief we
5 seek would not expand the judgment below because the two
6 rivers on which we lost are out of the case.

7 CHIEF JUSTICE ROBERTS: Well, I understand
8 that, but -- it seems reasonable, but they do cite a lot
9 of cases that say you can't do that. You can't just
10 sort of say, oh, I give up on the others, because the
11 judgment, I guess, is one whole, and you would be
12 changing the judgment.

13 MR. COLANGELO: Accepting this argument,
14 Your Honor, would not change the judgment. The cases
15 that Petitioner cites are all examples -- except for
16 one, which I'll get to in a second -- where the
17 Respondent was seeking to change the judgment, either in
18 its favor or to get lesser relief, or where the result
19 would necessarily have changed the judgment.

20 Here, accepting this argument would not
21 change the judgment.

22 JUSTICE GINSBURG: Why was it giving up --
23 you're giving up on the two rivers even though your
24 theory would work the same way with respect to them?

25 MR. COLANGELO: That's correct, Your Honor.

1 And that's consistent with the cross-petition rule. A
2 respondent who is satisfied with the result below and
3 does not seek to change the judgment does not need to
4 cross-petition. A cross-petition is only necessary --

5 JUSTICE GINSBURG: But do you think that the
6 trial court was wrong, the district court was wrong, and
7 the Ninth Circuit, both times, when they said, well, you
8 didn't prove -- there was no proof that the district was
9 responsible for a given part.

10 So, on your theory, both the district court
11 and the Ninth Circuit were wrong on that?

12 MR. COLANGELO: On that legal question, Your
13 Honor, yes. But this Court can affirm on any basis
14 preserved below, and this was also preserved in our
15 brief in opposition at the jurisdictional stage, as long
16 as it would not change the judgment.

17 And here's why it would not. Let me
18 distinguish the Northwest Airlines v. County of Kent
19 case, which Petitioner cites. That case presents, in
20 fact, the opposite situation of what we have here. In
21 that case, Respondents' argument, had it been accepted,
22 would have required the district court to grant further
23 relief in continuing proceedings on a claim that no
24 longer existed because the Respondents' argument was
25 that there was no private right of action at all.

1 Our case is the opposite because, if the
2 Court accepts our position, we simply don't get any
3 further relief with respect to claims that are waived to
4 which we would have been entitled. And the two cases
5 that we've cited by letter last week both represent
6 exactly that situation.

7 JUSTICE SCALIA: Mr. Colangelo, did you
8 raise this argument in your brief in opposition?

9 MR. COLANGELO: Yes, Your Honor, we did.

10 JUSTICE SCALIA: Where is it in that? I was
11 looking for it.

12 MR. COLANGELO: It's in two places in the
13 brief in opposition; page 4 to 5, where we set out this
14 compliance monitoring framework, and page 18 to 19.

15 JUSTICE SCALIA: That may be, but you don't
16 support -- and page what?

17 MR. COLANGELO: Page 18 to 19.

18 And then, again, in our supplemental brief,
19 Your Honor.

20 JUSTICE SCALIA: But you don't --

21 MR. COLANGELO: At the cert stage.

22 JUSTICE SCALIA: -- you don't say that
23 that's the basis for supporting the decision below. I
24 certainly didn't interpret it.

25 MR. COLANGELO: We do -- let me just quote

1 what may be the most explicit thing, Your Honor, which
2 is at the very bottom of page 4 in our supplemental
3 brief at the cert stage: "The Court of Appeals' ruling
4 was both correct and equitable. Every Clean Water Act
5 permit must include monitoring provisions ensuring that
6 permit conditions are satisfied."

7 And we lay out the compliance monitoring.
8 That's 4 to 5 of our supplemental brief in opposition to
9 cert.

10 JUSTICE SCALIA: I don't have your
11 supplemental brief in front of me.

12 CHIEF JUSTICE ROBERTS: Where on 4 to 5?

13 MR. COLANGELO: At the very bottom of page
14 4, the last two lines, and the top of page 5.

15 Final -- now, most of our supplemental brief
16 and our brief in opposition were addressing why we did
17 not think Petitioner's question merited this Court's
18 review.

19 This is the argument that we made in defense
20 of the judgment below: "The Court of Appeals ruling was
21 both correct and equitable. Every permit must include
22 sufficient monitoring to determine compliance."

23 JUSTICE SCALIA: Well, but that's just to
24 say you can rely on -- on the extant monitors.

25 MR. COLANGELO: Absolutely, Your Honor. And

1 Petitioner's saying we're not --

2 JUSTICE SCALIA: So you say, you know, they
3 were correct. You have to find some basis for
4 liability, and they use the monitors, and that's it.

5 It didn't -- it didn't say in detail that
6 these people had to go and set up their own monitoring
7 under the permit.

8 MR. COLANGELO: Your Honor, that was the --
9 that was our argument in the Ninth Circuit and at the
10 cert stage, and that -- we do lay out exactly how the
11 permit works.

12 The point is that the permit imposes
13 liability on the multiple dischargers --

14 JUSTICE SCALIA: You -- you told this to the
15 Ninth Circuit, and the Ninth Circuit said no?

16 MR. COLANGELO: That's correct, Your Honor.
17 That's correct. But we can -- we can defend the
18 judgment on a basis, even one that the Ninth Circuit
19 rejected.

20 To go back --

21 JUSTICE KAGAN: Counsel, suppose we did what
22 the -- the Solicitor General says to do and vacated
23 this. Can you think of any reason why the Ninth Circuit
24 would change its mind? I mean, is there any connection
25 between these two issues that you can point to such that

1 our making clear to the Ninth Circuit that they made a
2 mistake on one actually would affect their analysis on
3 the other?

4 MR. COLANGELO: There is one reason, Your
5 Honor, and that is that a permit is interpreted like a
6 contract, and it is a cardinal rule of contract
7 interpretation that a contract should be read where --
8 where possible to be both lawful and enforceable.

9 So the Ninth Circuit may go back down and
10 say: Okay, with this corrected understanding of the
11 universe of law and facts that apply, we see that
12 Petitioner's reading of the permit would render it
13 unenforceable because none of the permittees can be held
14 liable and therefore unlawful because the Clean Water
15 Act requires all permits to include within it
16 self-monitoring and self-reporting to demonstrate a
17 violation.

18 So the Ninth Circuit -- now, it may just --
19 it may just say: We say what we said before. But it
20 could reconsider on that basis and that would be a
21 legitimate basis for it to do so.

22 To go back to the earlier question about
23 where there is a discharge, there is no question that
24 Petitioner discharges these pollutants to these rivers,
25 so the only question for this enforcement proceeding is

1 where to measure Petitioner's discharges for purposes of
2 liability.

3 JUSTICE KENNEDY: Why is there no -- where
4 do I look to find out that the district is making a
5 discharge of polluted water other than under the Ninth
6 Circuit's theory that it's in the river itself?

7 MR. COLANGELO: Two places, Your Honor.
8 First is that it's a premise for the permit itself. So
9 if you look at page JA 55, it says the Petitioner
10 discharges stormwater into these rivers. And then the
11 very next paragraph shows that the Petitioner has done
12 an assessment of the pollutants that are typically in
13 its discharges, and it lists the ones that are now in
14 violation here.

15 So the permit, it didn't -- it came out of
16 this administrative process, and one of the elements --

17 JUSTICE KENNEDY: So is your theory that if
18 the district is permitted to, on a scale of 1 to 10, to
19 discharge up to 2, but that if the monitoring station in
20 the river shows an 8, then it is automatically liable
21 for the increase, even though other dischargers might
22 have made this?

23 MR. COLANGELO: Yes, yes, because --

24 JUSTICE KENNEDY: I don't get that from what
25 you have read. I've looked at --

1 MR. COLANGELO: Your Honor, because --

2 JUSTICE KENNEDY: -- the text you've read and
3 it looks to me like it's permittee by permittee.

4 MR. COLANGELO: It says that the MS4 is in
5 violation, that's correct. But then it says each
6 permittee must, when an exceedance is detected, take
7 these steps. So here what they have failed to do is
8 take the necessary steps to apportion responsibility
9 among the multiple contributors.

10 The second place, just to finish on the
11 proof that they discharge --

12 JUSTICE SCALIA: Finish that. So what's the
13 consequence of that?

14 MR. COLANGELO: I'm sorry?

15 JUSTICE SCALIA: Therefore each one of them
16 is liable for all of it?

17 MR. COLANGELO: No, no, Your Honor. No.
18 Each one is liable for what they put in and bears the
19 burden to demonstrate and limit what it puts in. That's
20 explicit in the permit.

21 JUSTICE SCALIA: But they haven't done to.
22 So what?

23 MR. COLANGELO: So that's a permit
24 violation, and result is that this pollution continues
25 year after year after year, when the point of the permit

1 and the point of the Clean Water Act was to eliminate
2 what everybody agrees is the biggest source of water
3 pollution in Southern California.

4 JUSTICE KENNEDY: So if each permittee is
5 allowed to put in a 2, but one permittee puts in an 8;
6 then both permittees are liable?

7 MR. COLANGELO: Correct, Your Honor.
8 Unless -- because those facts are not known at the time
9 the violation is detected.

10 JUSTICE KENNEDY: No, no, we now know the
11 facts because it's the hypothetical.

12 MR. COLANGELO: Okay. So if the permittee
13 has done its own monitoring in addition to what the
14 permit requires and can demonstrate that it did not put
15 anything in, then it is not liable. If not, then yes.
16 Two dischargers into the same river who agree in advance
17 to be measured by a single monitoring station in the
18 river are liable for what's measured there, and then
19 they sort it out.

20 And what -- Congress set up a regime that
21 would allow for system-wide and jurisdiction-wide
22 permits precisely because this problem was so
23 complicated.

24 CHIEF JUSTICE ROBERTS: Are the
25 provisions -- excuse me, the provisions we've been

1 talking about, the three that you cited and the one that
2 your -- are they boilerplate? Do they show up in every
3 typical stormwater permit?

4 MR. COLANGELO: Well, 109, the fact that the
5 permittees must conduct all monitoring to demonstrate
6 compliance, if "boilerplate" means that they are in all
7 permits, then yes, because that's a requirement of EPA
8 regulations.

9 CHIEF JUSTICE ROBERTS: Yes. What about the
10 one that says each permittee is responsible only for a
11 discharge for which it is the operator?

12 MR. COLANGELO: That's from a EPA
13 regulation, too, yes. That's in the definition of
14 "co-permittee" at 122.2; so yes, that's also standard in
15 system-wide permits.

16 To go back to the earlier question about
17 where there is a discharge, the district court found,
18 and this is undisputed, at petition appendix 117, the
19 permit admits -- the permittee, Petitioner, admits that
20 it is discharging these pollutants, the ones measured in
21 violation, to these rivers. So what we have is no
22 question, no dispute that they discharged these
23 pollutants, a monitoring system included in the permit
24 that the State court upheld against Petitioner's
25 challenge, showing that those limits have been exceeded.

1 JUSTICE BREYER: So your basic argument is
2 this permit requires you, L.A. County, to do monitoring
3 to decide if you're violating it. You chose this
4 system, then common sense suggests you're doing it. You
5 struck out twice with that argument --

6 MR. COLANGELO: Yes.

7 JUSTICE BREYER: -- in the other two rivers,
8 so now you're going to go back if we permit it, and you
9 want to make the argument and tell the Ninth Circuit:
10 Three times and you're out; in this case, hold the
11 opposite.

12 MR. COLANGELO: Well -- yes. I'm not sure I
13 would say we struck out, Your Honor; the --

14 JUSTICE BREYER: I understand it.

15 (Laughter.)

16 MR. COLANGELO: But correct, the lower court
17 did not -- neither lower court accepted this argument
18 fully. The Ninth Circuit did agree that all permits
19 must include compliance monitoring, but it said you need
20 a little more here. And we think that was improper
21 because you can't add terms to the permit once it's been
22 settled.

23 And there was an earlier question, Justice
24 Breyer, about could we sample from an individual
25 outfall, could we show more? The problem with that is

1 that it would prove nothing. The Petitioner has said:
2 Just sample from one outfall, one of our outfalls. We
3 alleged 140 violations for a dozen different pollutants
4 over a 5-year period. So sampling from a single outfall
5 as an evidentiary matter would be utterly meaningless.

6 JUSTICE BREYER: Couldn't you get some
7 expert who --

8 MR. COLANGELO: Well, we did, Your Honor, in
9 district court as an alternative theory have an expert
10 who said all of this came from them. The district court
11 did not address that and we didn't appeal. The appeal
12 was limited just to this legal issue.

13 JUSTICE SCALIA: I don't understand why you
14 didn't cross-appeal on -- on this theory that, that the
15 lower court rejected.

16 MR. COLANGELO: Because, Your Honor, we were
17 satisfied with the judgment; and that's the rule. A
18 respondent who is satisfied not need to cross-appeal
19 unless it is --

20 JUSTICE SCALIA: I didn't say you need to.
21 I didn't say you needed to. But I -- I would normally
22 have done it just to be sure I had that arrow in my
23 quiver and that it would not be argued, as it will be
24 here, that this would be expanding the judgment below.

25 MR. COLANGELO: And the reason it would not

1 be expanding the judgment below is that we are on the
2 opposite side of what happened in Kent. To rule in our
3 favor on this argument would just leave untouched two
4 claims on which we didn't prevail.

5 We'd get no further relief on those. It's
6 like two co-plaintiffs in district court who both lose
7 identical claims. One appeals and the other doesn't.
8 The one who appeals wins a reversal. That creates an
9 inconsistency: Two similarly situated plaintiffs, one
10 has a valid claim; one no longer does. But that's the
11 consequence of our failing to cross-petition.

12 JUSTICE SOTOMAYOR: I just don't remember
13 now. Do we have a circuit split on this issue of
14 whether a permit in a situation like this would impose
15 liability on all permittees?

16 MR. COLANGELO: No. No. There is no -- I
17 don't know of any other circuit court who has
18 addressed -- that has addressed this question.

19 And let me speak to the issue of additional
20 monitoring, putting the burden on plaintiffs to conduct
21 additional monitoring. The problem is it creates a
22 complicated factual dispute for district courts
23 resolve -- to resolve, when that was exactly what
24 Congress wanted to eliminate. When Congress adopted
25 this permit program in the Clean Water Act and then

1 amended it to bring municipal stormwater discharges
2 under the program, Congress said we do not want district
3 courts to be the forum for sorting out all of these
4 complicated factual issues.

5 JUSTICE BREYER: I see. What do you think
6 of the Government's point? They are telling us just
7 write what you usually write, and then you can go make
8 all your arguments, see what they do. Does that satisfy
9 you?

10 MR. COLANGELO: Your Honor, we would be most
11 satisfied with an affirmance on the grounds we have
12 presented. If the Court vacates we would be satisfied
13 with that, too, and then we would go back to the
14 district --

15 JUSTICE SCALIA: What if this panel found --
16 found for you on the ground that they used; they will
17 surely find for you on this other ground, which --

18 (Laughter.)

19 MR. COLANGELO: Yes. We expect they would.

20 JUSTICE SCALIA: -- which has at least an
21 inkling of plausibility.

22 MR. COLANGELO: Thank you, Your Honor.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Coates, you have 4 minutes remaining.

1 REBUTTAL ARGUMENT OF TIMOTHY T. COATES
2 ON BEHALF OF THE PETITIONER

3 MR. COATES: Thank you, Your Honor.

4 To the cross-appeal issue, the cases that we
5 cite talk about the Court's prudential limitation on
6 deciding questions that are not preserved by
7 cross-petition. And I depart from my learned opponent
8 Mr. Colangelo on that point as to what the Court's cases
9 say. We cite the Northwest Airlines v. County of Kent
10 case, and that is a case where in fact the respondent
11 was not seeking to change the judgment below; they did
12 not cross-petition.

13 They were just trying to keep what they had,
14 and the Court said we are not going to reach that issue
15 because if we buy the fact that there is no fact no
16 private right of action, the effect of that is to
17 essentially change the underlying judgment.

18 JUSTICE BREYER: Let me ask a quick
19 question.

20 MR. COATES: Sure.

21 JUSTICE BREYER: Does it satisfy you if we
22 just write in the judgment what you -- we usually write
23 and you can all argue what it means below? What about
24 that? Does that satisfy or do you want us to write
25 something special?

1 (Laughter.)

2 MR. COATES: It -- it's -- it's acceptable
3 because a reversal is always better than an affirmance.
4 But talking about what the Court decides and what's left
5 in the case, I think it is a case where the Court
6 reviews what the Ninth Circuit actually decided, what is
7 actually before it, and what is properly remaining in
8 the case, because we don't believe the cross-appeal
9 issue is here. And that leads, I think, to reversing
10 the Ninth Circuit, because the district is entitled to
11 summary judgment on these two river claims. And I think
12 that is all that's left in the case.

13 And I call the Court's attention to another
14 case we cited on the cross-appeal issue. It's one of
15 the NLRB cases, the Express Publication case. And it
16 makes it very clear there that the respondent was just
17 trying to hang on so much of what was good about the
18 order as he could keep and was not seeking to change
19 anything. And again, the Court said no.

20 It basically undermines the entire basis for
21 the --

22 JUSTICE SCALIA: Did we use our usual
23 language, and did it go back, and the -- and the court
24 of appeals considered --

25 MR. COATES: I think in one of the cases,

1 the Court --

2 JUSTICE SCALIA: -- considered the issue we
3 had refused to consider?

4 MR. COATES: In one of the cases, the Court
5 simply affirmed, and so it didn't go anywhere.

6 JUSTICE SCALIA: Okay.

7 MR. COATES: But --

8 JUSTICE SCALIA: Don't we have two -- I
9 don't know that we do this all the time. When we expect
10 them to keep the case and do something different, don't
11 we usually vacate and remand rather than reverse?

12 MR. COATES: Well, I do know that in the
13 context of a lot of the Court's opinions, the Court will
14 specify that judgment be granted in terms of a party.

15 I know the qualified immunity cases, you
16 find someone's entitled to qualified immunity, and it
17 comes up on a summary judgment, the reversal is -- to
18 the Ninth Circuit. And I've seen both languages used,
19 but it's plain from the text of the opinion, the
20 judgment is to be entered in favor of that party.

21 And, again, I think that's appropriate here.
22 My opponent suggests and the Government suggests, again,
23 that, let's go back to the Ninth Circuit and let them
24 consider this monitoring argument.

25 They considered it. In fact, they even

1 considered the use of contract terms that they urged
2 them to consider again.

3 It's already rejected that claim with
4 respect to these two rivers that are in front of the
5 Court. It's rejected it with respect to Malibu Creek
6 and Santa Clara River, which is not in front of the
7 Court. They even accepted it with respect to an entire
8 different party with County of Los Angeles --

9 JUSTICE SCALIA: But they might change their
10 mind now. They might change their mind.

11 MR. COATES: It would be a very odd judgment
12 because you'd have two claims that are -- continue to be
13 dismissed that are not properly before any court. Those
14 close -- those are closed. And you have another party
15 out of the case on the very ground that the Ninth
16 Circuit rejected in the initial opinion.

17 A sort of remand for some consideration of
18 an issue that's already spoken on just doesn't seem to
19 make sense and invites the very sort of kind of
20 jurisdictional confusion that I think leads the Court,
21 for prudential reasons, not to consider these things
22 unless there's a cross-petition.

23 I think that's why this is kind of a great
24 example of why prudential reasons say you should not
25 consider it.

1 CHIEF JUSTICE ROBERTS: Well, I understand,
2 and you do cite a lot of cases for that, but I can't
3 figure out what sense it makes.

4 I mean, if you're willing to give up
5 Santa Clara and Malibu, you're -- you're safe there, and
6 that's the only thing you've won. Why does it -- how
7 does that make sense?

8 MR. COATES: Well, the Court does it for two
9 reasons. It does it as a prudential matter because it
10 does look odd to affirm on -- to make a decision in this
11 Court on a ground that essentially repudiates the lower
12 court decision. It does it for prudential reasons.

13 And, in fact, the case they cite with Toray,
14 which basically says the Court has the jurisdiction to
15 do that -- when someone abandons the piecemeal claim --
16 is cited only once in this context after that, and
17 that's in the United States v. ITT Continental Baking
18 case, 420 U.S. 223, footnote 2.

19 And the court gives it a "but-see" for the
20 proposition that you have the jurisdiction to do it;
21 but, then describes this exact situation and says, for
22 prudential reasons, we don't do it because it undermines
23 our cert jurisdiction, particularly if resolution of
24 that issue is highly fact-specific -- the one they are
25 trying to bring up -- and it would really foreclose

1 having to even decide this cert issue because you
2 wouldn't get to it.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 12:12 p.m., the case in the
6 above-entitled matter was submitted.)

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